No. 11,875

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SYLVIA RINGSTAD,

Appellant,

vs.

CHARLES W. GRANNIS and ZELMA GRANNIS,

Appellees.

BRIEF FOR APPELLANT.

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This action was filed in Fairbanks, Alaska in 1945; a trial was had, and an appeal taken to the United States Circuit Court of Appeals and filed in said Court under No. 11,283. This case was briefed and the Circuit Court of Appeals decided the case on the 31st day of January, 1947, and is now found in 159 Fed. (2d) at page 289. After reversing the case it was remanded for a new trial.

The action was one in ejectment and for damages for wrongfully trespassing on real estate and wrongfully withholding possession thereof. The jurisdiction of the District Court of Alaska is specifically provided for in the Compiled Laws of Alaska, 1933, as amended, especially Sections 3761, 3764 and 3766, which are as follows, to-wit:

"Sec. 3761. Who may bring such action and against whom. Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of anyone, then against the person acting as the owner thereof. (1133-CLA)."

"Sec. 3764. Defendant not to be allowed to give evidence in certain matters, unless. Judgment, when conclusive against landlord. The defendant shall not be allowed to give in evidence any estate in himself, or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate, or license, or right to the possession shall be set forth with certainty and particularity required in a complaint. If the defendant does not defend for the whole of the property, he shall specify for what particular part he does defend. In an action against a tenant the judgment shall be conclusive against the landlord who has been made defendant in place of the tenant to the same extent as if the action had been originally commenced against him. (1136-CLA.)"

"Sec. 3766. Damages recovered; improvements. The plaintiff shall only be entitled to recover damages for withholding the property for a term of six years next preceding the commencement of the action, and for any period that may elapse from such commencement to the time of giving a verdict therein, exclusive of the use of permanent improvements made by the defendant.

When permanent improvements have been made upon the property by the defendant, or those under whom he claims, holding under color of title adversely to the claim of plaintiff, in good faith, the value thereof at the time of trial, not exceeding such damages, shall be allowed as a set-off. (1138-CLA)."

The right of appeal to this Court is provided for by Chapter CXIX C.L.A. 1933, at page 802.

This appeal was duly perfected and lodged in this Court within the time allowed by law, and by the extensions granted by the District Court of the Territory of Alaska.

The points relied upon for reversal are set forth in the printed transcript of record, commencing on page 206; the first of which is as follows, to-wit:

"Statement of Points Relied Upon for Reversal.

I.

The Court erred in refusing to instruct the jury to return a verdict for the plaintiff for the recovery of the property at the close of the testimony, for the following reason:

a. The plaintiff proved, and it was not denied, in any of the defendants' testimony, or elsewhere, that Lot Three (3), Block Ninety-five (95), Townsite, of Fairbanks, belonged to her; she introduced a complete chain of title conveying this property down to her in support of her ownership.

b. She proved open, notorious and continuous possession in her, and her predecessors for

about thirty-five years continuously until the dispute arose after the defendants moved on Lot 2, Block 95, next door east of her old home in 1945.

c. She established the fact that the property was enclosed by a fence for many years prior to the time she purchased it in 1933, and up to, and including May, 1945, the date the trouble arose.

d. She established the exact location of the old fence for about thirty-five years prior to 1945.

e. She testified, and no one ever disputed the fact, that fence was exactly on the line of the property that she claimed in this suit from 1933 at the time she purchased it, to and including the spring of 1945; or a total of twelve years of open, notorious and undisputed peaceable possession by her.

f. No one, not even the defendants, or their predecessors ever questioned her title or right of possession, until the defendants moved on the adjoining property in 1945 and tore the old fence out, and then questioned the right of possession of plaintiff as is shown on the plat Exhibit 'C' of a part of the old fenced property claimed by her, which property questioned by the defendants, consisted of the part east of the line shown on said plat, which commenced at the northeast corner of said property and extends in a southerly direction across said property to the southwest corner thereof, which includes exactly one-half of said property in a wedge shape 22.9 feet at the southerly end and to a sharp point at the northerly end. This takes in two-fifths of the Ringstad house at the south end thereof. The testimony stands admitted that the house has stood in its exact position for more than thirty years last past,

and also takes in the driveway, clothes line and the sewer that have been there for many years until the dispute between the plaintiff and defendants arose in May of 1945, and this line had never been in dispute until then."

"Therefore, the Court erred in not sustaining plaintiff's motion for an instructed verdict as to the right of possession of the real estate involved, it having been established and not denied that she had continuous, open, notorious prior possession for more than twelve years prior to the trespass by defendants in May, 1945, and plaintiff's predecessors had had open, notorious, continuous possession for over thirty-five years prior to 1945."

In support of this point for reversal, the appellant relies on the undisputed evidence as shown by the bill of exceptions, which is definite and certain, and not denied in any way and conclusively establishes the fact that the plaintiff, Sylvia Ringstad, purchased the property here involved, being described as Lot 3, Block 95, Townsite of Fairbanks, in the spring of 1933 and moved thereon; that the same was enclosed by an old fence at that time; which fence stood there until the spring of 1945 when the defendants moved on the adjoining property lying immediately east thereof and had a survey made; which disclosed that the old fence dividing the two properties, that had stood there for a period of approximately thirty-five years, was not on the line as it was shown upon the plat made from the survey of L. S. Robe in 1909. (See T. R. p. 198.)

This undisputed evidence shows that there was no controversy of any kind between the plaintiff owning

Lot 3 and the various persons who owned Lot 2, and no one ever questioned the established boundary line marked by the old fence until the spring of 1945; at which time a controversy arose after a survey had been made disclosing the fact that the thirty-five year old fence was not on the line between Lots 2 and 3 of Block 95, Townsite of Fairbanks, as shown on the plat made from the survey notes of L. S. Robe of 1909, and certified to by Henry T. Ray, on the 17th day of August, 1910.

This leaves a period from the 12th day of April, 1933 (the date of the Administrator's Deed from John Butrovich, Jr., Administrator of the estate of Henry Kortlitzky, deceased, to the plaintiff, Sylvia Ringstad (T. R. p. 81) up to the spring of 1945, or a period of more than twelve years of continuous, open, notorious, adverse and undisputed peaceable possession in the plaintiff, Sylvia Ringstad.

Then by a deed admitted in evidence, over the objections of the plaintiff, which deed was executed by Jack Tobin to C. W. Grannis and Zelma D. Grannis, the defendants herein, which deed was dated the 18th day of May, 1945 (T. R. p. 171), which is the first and the earliest date to be shown by the evidence that the defendants ever claimed an interest in the said Lot 2 adjoining the property here involved on the east, and the first time that the boundary line established between these properties was ever questioned.

This being established and undenied, it is the appellant's contention that the Court should have sustained the plaintiff's motion for an instructed verdict as to

the right of possession of her property, and the ejectment of the defendants therefrom, and the failure to do so was error on the part of the Court.

In support thereof appellant wishes to cite two sections of the Compiled Laws of Alaska, 1933, which are in words and figures as follows, to-wit:

> "Sec. 4313. Title by adverse possession. The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more shall be conclusively presumed to give title thereto except as against the United States. (1874-CLA.)"

> "Sec. 3764. Defendant not to be allowed to give evidence in certain matters, unless. Judgment, when conclusive against landlord. *The defendant shall not be allowed to give in evidence any estate in himself, or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer.* If so pleaded the *nature and duration of such estate,* or license or right to the possession *shall be set forth with the certainty and particularity required in a complaint. If the defendant does not defend for the whole of the property, he shall specify for what particular part he does defend.* In an action against a tenant the judgment shall be conclusive against the landlord who has been made defendant in place of the tenant to the same extent as if the action had been originally commenced against him. (1136-CLA.)" (Italics mine.)

The amended answer filed by the defendants after this case had been reversed by this honorable Court did contain an additional clause over and above the original answer. The answer is set out on T. R. p. 7,

and the amended answer is on T. R. p. 9. I call your attention that the only difference in the two answers is, that in the amended answer you will find these words:

> "And for a Further Separate and Affirmative Answer and Defense to the First, Second and Third Causes of Action Contained in Plaintiff's Second Amended Complaint, Defendants Allege: That at all of the time mentioned in Plaintiff's Complaint (7) and for a long time prior thereto, and until recently when the defendants sold the same, they were the owner in fee simple and in the possession of Lot Two (2) in Block Ninety-five (95) of the Townsite of Fairbanks, Alaska, according to the official map, plat and survey thereof."

We call your attention that this statute above pleaded, to-wit, Section 3764-CLA, 1933, provides:

> "The defendant shall not be allowed to give in evidence any estate in himself, or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded the nature and duration of such estate, or license or right to the possession shall be set forth with the certainty and particularity required in a complaint. If the defendant does not defend for the whole of the property, he shall specify for what particular part he does defend."

Immediately preceding this section we find Section 3763, which is as follows:

> "Sec. 3763. What to be pleaded in complaint. The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for

whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to his damage in such sum as may be therein claimed. *The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had.* (1135-CLA.)"

It surely cannot be contended that the amended answer raised any issue that was not raised before at the time this case was decided by this Honorable Court in January, 1947.

This answer does not allege that the defendants own any part of the property sued for and claimed by the plaintiff, or make any effort to describe with certainty anything or any part of the property claimed by the plaintiff.

There being no dispute of the established fact that the plaintiff did have exclusive, open, notorious, peaceable and adverse possession of the property claimed by her, and that it was all within her old fence. Then the Court erred in submitting the question of ownership and right of possession to the jury on the wrongful theory that, the acts of the defendants in ousting the plaintiff by tearing down her fence in May, 1945, after she had had peaceable, quiet, adverse, open, notorious, possession for twelve (12) years; was defensive matter and this was error on the part of the trial Court, and in support of this statement, I beg to call the Court's attention to the following cases:

Campbell v. Silver Bow Basin Mining Co., 49 Fed. 47.

"* * * a person in possession may maintain an action to recover possession of real property from which he has been ousted by a mere intruder."

Campbell v. Silver Bow Basin Mining Co., 49 Fed. 47;

Wilson v. Fine, 38 Fed. 789;

Feehely v. Rogers, 80 Fed. (2d) 719;

Price v. Brockway, 1 Alaska 233.

I believe the universal rule to be, that when a landowner, acting under a mistake as to the true boundary between his land and that of another, takes possession of land of such other, believing it to be his own, incloses it, claims title to it, and holds possession for the statutory period, he becomes the owner, for such possession and claim of title, though founded on a mistake, are adverse.

In the old Oregon case of *Caufield v. Clark,* 17 Oregon 473, 11 A.S.R. 845, sustain this theory, and the Alaska statute, being taken from Oregon, this decision should be at least very persuasive in the case at bar. The first and only syllabus reads as follows:

"Adverse Possession.—One Who by Mistake as to Boundaries enters upon and occupies land not embraced in his title, claiming it as his own for the requisite statutory period, thereby becomes invested with the title thereto by possession, although his entry and possession may have been founded upon a mistake."

The Supreme Court of Minnesota passed on this question in the case of *Fredericksen v. Hinkle,* 209 N. W. 257. The third, fourth and sixth syllabus reads as follows:

"3. Adverse possession—Possession of successive occupants who are in privity may be tacked to make possession for statutory period."

"4. Adverse possession — Possession beyond boundary line, under mistake as to true line, but with intent to appropriate, is 'adverse possession'."

"6. Adverse possession—Title acquired by adverse possession is legal one, though not of record, and is not lost by ceasing of occupancy."

I especially call your attention to the sixth syllabus above cited as this seems to have been the confusing part of the trial in this case, both to the Court and the jury, and for that reason, I am quoting from the body of the opinion on page 259, as follows:

"6. To maintain a title, acquired by adverse possession, it is not necessary to continue the adverse possession beyond the time when title is acquired. *The title once acquired is a new title; a legal title though not a record title is not lost by a cessation of possession, and continued possession is not necessary to maintain it.* McArthur v. Clark, 86 Minn. 165, 90 N. W. 369, 91 Am. St. Rep. 333; Dean v. Goddare, 55 Minn. 290, 56 N. W. 1060. The authorities are uniform. 2 Tiffany, Real Prop. (2nd Ed.) 511; 3 Thompson, Real Prop. 2516; 3 Washburn, Real Prop. (6th Ed.) 1994; 2 C. J. 251-258; 1 R. C. L. p. 690, 5; 1 Cent. Dig. Adverse Possession 604, 623; volume 1, First and Second Decennial Digest, 'Adverse Possession,' 106. This is said in response to a suggestion that the plaintiff may not have had adverse possession or possession at all at all times after he bought. Title was perfected by adverse posses-

sion many years before he bought. Judgment affirmed." (Italics mine.)

The Supreme Court of Kentucky decided this question in the case of *Turner v. Morgan,* 165 S. W. 684, and followed the same rule. The second syllabus reads as follows:

"2. Adverse Possession — Boundary Line — Mistaken Location. Where defendant claimed land in controversy to a mistaken division line, and constructed what he claimed was a line fence, claiming that his deed covered all the land up to the fence, and did not recognize any possible right of another to any part of the land so inclosed, his holding was adverse."

In the case *Edwards v. Fleming, et al.,* 112 Pac. 836, the Supreme Court of Kansas in an early case was very definite in its decision and follows the law set forth in the case cited above, and this Kansas case is directly in point with the case here, and the fifth and seventh syllabus reads as follows:

"5. Adverse Possession—Establishment—Effect of Statutory Survey. Where it appears that the plaintiff has acquired title by deed, adverse possession, and acquiescence in the boundary by the defendants, a survey afterwards made at the request of the defendants, under the provisions of section 2275, Gen. St. 1909, fixing a different boundary to the tract claimed by the plaintiff, furnishes no defense to an action to quiet plaintiff's title."

"7. Adverse Possession—Boundaries—Mutual Agreement of Parties. Adjoining landowners may, either by writing or by parole, agree upon

the boundary between their lands, and their possession on either side up to the boundary so agreed upon will be mutually adverse."

The Supreme Court of Arkansas, in 1911, passed directly on this question in the case of *St. Louis Southwestern Ry. Co. v. Mulkey,* 139 S. W. page 643. The sixth syllabus reads as follows:

"6. Adverse Possession—Tacking Possession. Though the land described in a deed did not include a strip claimed adversely by the grantee, if the grantors, who had held it adversely, thought it did, and in fact transferred possession of such strip, there was such privity as to entitle the grantee to tack her adverse possession to that of her grantors."

This case is a similar case to the Ringstad case from the point of facts. Fairbanks was a small town, settled principally by a group of miners who built their homes and lived among themselves, respecting each other's rights, and the evidence in this case shows that R. M. Crawford obtained his deed from the trustee, George A. Parks, conveying Lot 3, in Block 95, in compliance with an act of Congress approved March 3, 1891.

It is quite clear from the evidence, that Mr. Crawford either constructed the old house on this property or purchased it from some one who had built it about 35 years prior to the dispute arising over the boundary line, which took place in May, 1945. The trustee's deed is found at page 70 of the T. R.

Mr. Crawford deeded it to Henry Kortlitzky in August, 1923. (See deed, T. R. p. 72.) The evidence

shows that Mr. Kortlitzky lived in the old house on the property until he died. Then the administrator of the Kortlitzky estate sold this property to the plaintiff, Sylvia Ringstad, on the 17th day of April, 1933. (See administrator's deed, T. R. p. 81.)

The evidence shows, that the old fence dividing Lots 2 and 3 had stood there, on what the owners believed to be the line between the two properties, for 30 years, and was still standing there during the time that Mrs. Ringstad and her children resided on the property. The undisputed evidence is, that a large pole for a radio aerial was standing for years in the southeast corner of the lot; that the fence became rotten and some of the posts fell over, and the wire was down on the ground in the early spring of 1945, when the defendants claimed to have purchased the property next door, and then the trouble commenced. As the record stands, the plaintiff and her predecessors, had possession of the land in question here, and claimed by her, for at least 30 years prior to the dispute that arose over the boundary line, in May, 1945. (See Mrs. Ringstad's testimony commencing on page 83 of the T. R.)

Appellant contends that the trial Court should have sustained her motion for an instructed verdict, ejecting the defendants and restoring her to the possession of the triangular strip of land involved in the dispute as is shown by the plat. (T. R. p. 164.) We request of this honorable Court to render the judgment, that should have been rendered in this case, and stop the long and expensive legal proceedings that has been endured since 1945; which necessitated

two appeals to this honorable Court, and call your attention especially to the judgment rendered by the trial judge in the case (T. R. p. 156), in which he ignored the verdict of the jury and rendered a judgment; which granted the plaintiff the ground under the old house, but took away from her the entire south end of the lot, leaving her with no entrance to the back of her house, taking away her driveway and sewer line that had been there for many years, and used by her and her tenants, when the trial judge should have sustained the plaintiff's request for an instructed verdict.

II.

THE SECOND POINT RELIED ON FOR REVERSAL IS:

Error of the Court in refusing to give plaintiff's offered instruction numbered 1, which is as follows:

> "You are further instructed that continuous prior possession is a sufficient estate to warrant a suit in ejectment against an intruder and in this behalf you are instructed that the Statute of Alaska, and especially Section 4313 of the Compiled Laws of Alaska, 1933, provides:
>
> 'The uninterrupted, adverse, notorious possession of real property under color and claim of title for seven years or more shall be conclusively presumed to give title thereto, except against the United States,' and, in this behalf, if you find from a fair preponderance of the evidence that the plaintiff has been in the open, notorious and adverse possession of the property in question here for seven years prior to the claimed trespass

then her title would be complete, and your judgment should be for plaintiff."

This being founded upon Section 4313-C.L.A., and the former decision of the Court in this same case, 159 Fed. (2d) 289; also *Campbell v. Silver Bow Basin Mining Co.,* 49 Fed. 47; *Wilson v. Fine,* 38 Fed. 789, 792, and many other cases in point.

The instruction offered literally followed the law of the case as established by this honorable Court in this same case decided on January 31, 1947, and now found in 159 Fed. (2d) at page 289. From page 290 I quote:

> "Continuous prior possession is a sufficient estate to warrant a suit in ejectment against a mere intruder. Campbell v. Silver Bow Basin Mining Co., 9 Cir. (1892) 49 F. 47; Wilson v. Fine, D. C., 38 F. 789, 792."

Unquestionably, if this instruction had been given, the verdict of the jury would have been for the plaintiff, because there was not the slightest evidence, suggestion or inference to be drawn from the evidence that there was ever a dispute over the correctness of the line of the Ringstad property up until the defendants moved on the property adjoining after the 18th day of May, 1945; this date being fixed by the testimony, and by the defendant's deed itself, which is defendant's Exhibit "3", and is found at page 171 of the T. R.

This instruction was prepared and offered by the plaintiff and refused by the Court, and it is appellant's contention this action was error.

The statute above mentioned, Section 3761-C.L.A. 1933, was taken from Oregon and is identical with Section 5-102, Oregon Code, 1930, down to the words, "Such action shall be commenced", etc., and so far as it affects this case is exactly the same, and the Supreme Court of Oregon in the case of *Feehely v. Rogers,* 80 Pac. (2d) 717, recently said, quoting from the body of the opinion on page 719:

> "In this state the rule has become fixed that possession is a sufficient interest in land to enable one ousted therefrom to eject a trespasser or one unable to show a better title. Gallaher v. Kelliher, 58 Or. 577, 114 P. 943, 115 P. 596; Browning v. Lewis, 39 Or. 11, 64 P. 304; Sommer v. Compton, 52 Or. 173, 96 P. 124 (1065); Oregon Ry. & Nav. Co. v. Hertzberg, 26 Or. 216, 37 Pac. 1019."

The statute relied upon by plaintiff in requesting this instruction, was Section 4313 C.L.A., 1933, and is identical with Section 1874 C.L.A. 1913, and is also identical with Section 1042, Carter's Annotated Alaska Code of 1900. Therefore, the section relied upon for the instruction offered was in full force and effect at all times from the earliest settlement of the property involved herein.

It is to be noted, that this section specifically applies to Title by Adverse Possession; it contains these words, "under color and claim of title". There is no dispute about the plaintiff claiming title for more than twelve years continuously, and immediately prior to the date the defendants moved next door east; which was in the spring of 1945, and the deed, under which they claim to have taken title, was dated May 18, 1945. (T. R. p. 171.)

Appellant contends that she had complied with both parts of this statute; had color of title and claim of title. Her deed was dated April 12, 1933, and she testified, and no one ever disputed it, that she moved in right away, and no one ever disputed the boundary line until 1945, in May or June. This deed was color of title, and in support of this statement I wish to cite the following cases directly in point:

Hesser v. Siepmann, et al., 76 Pac. 295. The Supreme Court of Washington held:

> "4. Where, at the time deeds to a city lot were given to plaintiff and her husband, it was understood that a strip excepted by the deed from the lot was a portion of the lot which was occupied by a street, and that the lot which was purchased reached to the line of the street or avenue, and there was no intention to purchase a lot with such a strip intervening between the boundary of the lot purchased and the street, the deed to the lot as actually conveyed was sufficient to constitute color of title to the strip."

In the old case of *City of Seattle, Schlossmacher v. Beacon Place Co.,* 100 Pac. 1013, the Court held:

> "4. Adverse Possession—'Color of Title.' A possession of land by a grantee in a deed of land under the belief that he is the actual possessor of the land conveyed, and he intends to so hold, is a holding under color of title."

I quote from the body of the opinion on page 1015, as follows:

> "It is, however, urged by appellant that the Nelsons did not hold under 'color of title and claim of right.' Their possession under the Allen

> deed, the construction and intent placed upon that deed as to the property thereby conveyed, their possession under the belief that they were actually in possession of the property conveyed, and their intention to so hold would be a holding under a color of title. In the case of Flint v. Long, 12 Wash. 342, 41 Pac. 49, this court, in speaking of 'color of title' in this connection says: 'All that is necessary to be shown is that there was a proof of colorable title under which the entry or claim has been made in good faith.' * * *''

Flint, et al. v. Long, et al., 41 Pac. 49, is a very old case, but well considered, and the first syllabus reads:

> "1. One who purchases land under a deed of certain lots as platted obtains color of title to lots staked off as such lots, though in fact they are not the lots called for by the plat."

It is very apparent that in the wording of the Alaska statute, above referred to, that it was the legislative intent to use the two words as synonymous, they are connected by the conjunction, "and". The Supreme Court of Montana very recently in the case of *Sullivan v. Neel, et al.,* 73 Pac. (2d) 206, definitely construed them to be synonymous terms, and in the Alaska statute they are so used in connection, that it is evident that they were used so as to mean the same thing.

The Supreme Court of Montana in passing on this question in the case of *Fitschen Bros. Commercial Co. et al. v. Noyes' Estate,* 246 Pac. 773, quoting from the body of the opinion on page 779 held:

> "By the words 'claim of title' used in the statute, it is apparent that color of title is meant. And color of title is that which is title in appearance, but not in reality. As a basis of claim by adverse possession, color of title may be shown by any instrument purporting to convey the land or the right to its possession, provided claim is made thereunder in good faith."

Beyond the purview of all doubt, the original owner of the land here involved thought that he was fencing the property that belonged to him. Please note the plat, 164 of the T. R., and see how the old house was built on the lot, straight with the lines of the fence, also note the pencil line on the plat representing the sewer running from the back of the house to the street, and expecially note the back line running from the northeast corner of the ground to the southwest corner contended for by the defendants, it passes directly through the old house each of the deeds referred to as covering this lot must have intended to convey the fenced land with the old house on it. Mrs. Ringstad testified that it was sold to her as it was fenced, and she bought it that way. She occupied it that way for more than twelve years. Therefore, the deed was color, and claim of title as set forth in Section 4313 C.L.A., as color of title is a writing upon its face, professing to pass title, but which does not do so, and that is exactly what the various deeds to the land above referred to actually did. Each thought he was conveying the exact property fenced and each person believed they were buying that particular property; and in good faith went into possession

thereof and held adversely for many years, and the continuity of title gives Mrs. Ringstad the right to rely on the continuous possession of her predecessors coupled with that of her own to the extent of over thirty years.

Therefore, the Court erred in not giving the instruction, or in giving the substance of it in another instruction, if there was any particular part of the instruction objectionable. It was sufficient to call it to his attention, and his action in the matter was error.

III.

THE THIRD POINT RELIED ON FOR REVERSAL IS:

"Error of the Court in giving instruction Number IV, which instruction is as follows:

IV.

a. For the Plaintiff, Sylvia Ringstad, to be entitled to a verdict herein, she must prove by a preponderance of the evidence in this case each of the following matters, to-wit:

(1) That she and/or her tenants have had possession of said land in controversy herein for ten years;

(2) That such possession was at all times under a claim by her of title to said land in herself, and hostile and adverse to the title of anyone else;

(3) That such possession was at all times actual;

(4) That such possession was at all times open;

(5) That such possession was at all times notorious;

(6) That such possession was at all times continuous for said ten-year period;

(7) That such possession was at all times uninterrupted for a period of ten years;

(8) That such possession was at all times exclusive;

(9) That such possession was at all times visible to anyone in the immediate vicinity of said land.

If the Plaintiff, Sylvia Ringstad, proves each of the above-mentioned matters by a preponderance of the evidence in this case, you should find that she had title to and was the owner of said land in controversy.

If any one of the above-mentioned matters is not proved by a preponderance of the evidence in this case, you should find that the plaintiff, Sylvia Ringstad, is not the owner of said land in controversy herein, and you should bring in a verdict for the defendants.

You are instructed that it is not necessary that said land in controversy herein should have been possessed by the plaintiff as a separate piece of land, but it would be sufficient possession thereof if it, together with lands adjoining it in Lot 3, were enclosed in one tract as shown by the red lines upon plaintiff's Exhibit 'C' and plaintiff's possession of the entire tract would be possession of the land in controversy herein." (Exception allowed plaintiff.)

Section 4313 C.L.A., 1933, does not require or use the words open, continuous, exclusive or visible, and the wording of the instruction placed an extra burden on the plaintiff that was not justified under the Alaska Laws.

IV.

THE FOURTH POINT RELIED ON FOR REVERSAL IS:

"Error of the Court in giving subdivision 'h' of instruction V, which is as follows:

h. If you do not find that plaintiff Sylvia Ringstad, is the owner of said land in controversy by adverse possession thereof, you should consider whether or not she is the owner of the part of said land in controversy which is covered by a part of the house of plaintiff. The same elements would have to be proved as to such land covered by said house as was stated hereinabove to be necessary to prove title in plaintiff by adverse possession of the whole of said land in controversy. If you find against the plaintiff as to the whole of said land in controversy herein, and find in favor of plaintiff as to the part of said land in controversy covered by said house, you should sign Verdict Number II."

"Error of the Court in giving subdivisions 1, 2 and 3 Instruction No. VI, and sub-division 2 of Instruction VI.

(c) In order for plaintiff to be entitled to more than nominal damages for any tearing down of said first mentioned fence, she, Sylvia Ringstad, must prove by a preponderance of the evi-

dence in the case, each of the following matters, to-wit:

(1) That in May, 1945, she had a fence standing upon the land in controversy herein, which fence defendants then tore down;

(2) That said fence was of a *specified value in dollars and cents* in its standing condition just before it was torn down;

(3) That by reason of the tearing down of said fence, the plaintiff *suffered a definite specified damage in dollars and cents.*

* * * * * * *

(e)

* * * * * * *

(2) That the defendants *then and there destroyed said materials;* (Italics mine.)

For the reason this does not state the law correctly and places an extra burden on the plaintiff, and was very prejudicial to the plaintiff."

V.

THE FIFTH POINT RELIED ON FOR REVERSAL IS:

Appellant will group the Sixth and Seventh points relied upon for reversal together for argument as follows, to-wit:

"Error of the Court in answering a request for additional instructions by calling the Jury in at 8:30 o'clock P.M., August 25, 1947, without the knowledge of plaintiff's attorney and without his being present and gave them the following instruction:

"District Court, Terr. of Alaska 4 Div.
Ringstad v. Grannis, et al., No. 5357.

Filed in the District Court Territory of Alaska, 4th Div., August 26, 1947 /s/ John B. Hall, Clerk.

INSTRUCTION

"The Jury is instructed that,

Open as used in the Court's instructions means—not covered or concealed.

Exclusive possession in plaintiff means possession by plaintiff which is not shared with anyone claiming adversely to plaintiff but by plaintiff and those she has given permission to be there.

Harry E. Pratt,
District Judge."

He was so informed, he objected, and an exception was allowed to plaintiff.

VII.

Error of the Court committed as follows:

"At 12:15 o'clock A.M., August 26, 1947, the Jury reported that it was unable to agree upon a verdict, but might do so if additional instructions were given. The Court instructed the jury to retire and put in writing its request for instructions, thereafter the jury presented the following request:

"A. That such possession was at all times visible to anyone in the immediate vicinity of said land."

"Visible? Does the corner markings with an imaginary line running straight between corners or must it be a visible fence?"

The Court then gave the following instruction: "In the District Court for the Territory of Alaska,

4th Div.

Ringstad v. Grannis, et al.

INSTRUCTIONS

"The Jury is instructed

Visible possession of a piece of ground exists only where there is some marking which may be seen that defines the limits of the possession. Corner markings with merely an imaginary line running straight between corners would not suffice to limit and define a possession of the land in controversy herein so as to make it a visible possession.

Harry E. Pratt,
District Judge."

(T. R. pp. 144-145.)

"To the giving of such instruction, the plaintiff objected and excepted for the reason it improperly stated the law and was prejudicial to the plaintiff, and was allowed an exception by the Court."

"After this instruction was given the jury soon returned the verdict for the defendants and was an incorrect instruction which caused the Jury to return a verdict in favor of the defendants."

(T. R. p. 212.)

Appellant claims this was reversal error, and resulted in a very quick judgment for the defendants, and the instruction did not properly state the law

for two reasons. One that it was based upon a condition arising after May of 1945, at a time when the defendants had trespassed upon the plaintiff's ground and dispossessed her thereof; and secondly, it was gross error, especially where the jury had asked a question as follows:

> "Visible? Does the corner markings with an imaginary line running straight between corners or must it be a *visible fence?*" (Italics mine.) (T. R. pp. 144-145.)

And, in answer to this question the instruction included by inference that there must be this "visible fence" as set out in the question.

Please note the wording of the question asked by the Jury along with the instruction given by the Court. This instruction given at the time, and under the circumstances amounted to, and was no less than an instruction to render judgment for the defendants, because all of the evidence was to the effect that the old fence was down on the ground when the trouble arose.

Appellant's contention is that it is not necessary at all to completely enclose a town lot to establish adverse possession, for if this was the rule ninety-nine out of every one hundred town properties would not be protected by the law of adverse possession.

In support of this contention, I call your attention to *Goodrich v. Mortimer,* 186 Pac. 844. The third syllabus reads as follows:

> "3. Adverse possession—Inclosure not necessary in case of entry under color of title.

> To constitute actual possession, inclosure of town lot by a fence or other structure was not necessary; the entry being under color of title supplied by a tax deed supported by insufficient notice and affidavit."

Without a question of a doubt the plaintiff had established title by prescription by having adverse possession from 1933 to 1945 of the triangular strip of land involved here. The limitation of actions statute affecting the recovery of real property is: 3354-CLA, 1933, and the part of this statute affecting this action is as follows:

> "Sec. 3354. Within ten years. The periods prescribed in section 3353 for the commencement of actions shall be as follows:
>
> "Within ten years actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it shall appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within ten years before the commencement of the action." (836-CLA.)

A similar statute with a four year period has been construed by the Supreme Court of Georgia in 1931, in the case of *Woodcliff Gin Co. et al. v. Kittles, et al.,* the second syllabus by the Court reads as follows:

> "2. The judge did not err in directing a verdict in favor of the plaintiffs upon the ground that they had acquired title by prescription to the certificates of stock involved in this case."

And, the very long opinion is quite enlightening on the subject, and in this case at the close of the evi-

dence the Court instructed the jury to return a verdict for the plaintiff on the theory that the plaintiffs had had possession of the stock for a longer time than was required by the statute of limitation, and the Georgia Supreme Court upheld the trial Court in instructing the verdict for the plaintiffs.

VI.

THE SIXTH POINT RELIED ON FOR REVERSAL IS:

> "Error of the Court in overruling plaintiff's motion for a new trial as shown in the transcript, which motion is hereby made a part of this statement of points by reference as fully as if set out herein in full."
>
> "This above statement or points will be covered by Appellant's brief, and are relied upon for reversal."

The Sixth and last point relied upon for reversal, last above set forth, is set out herein to call the Court's attention to the facts that all of the matters covered by this brief were called to the trial Court's attention in the motion for a new trial. This point will be submitted on the authorities and statutes set forth above.

CONCLUSION.

In conclusion, permit me to suggest that this Honorable Court render the judgment that should have been rendered in the trial Court. In my humble opinion there is, and could be, no legitimate defense to the

plaintiff's right to recover the property taken away from her by force. The defendants did not plead title in themselves as required by law, and were not entitled to make any proof thereof, and the only proof thereof, if any there was, was made over the objections of the plaintiff. The trial Court should have sustained the plaintiff's motion for an instructed verdict as is shown in the transcript of record at page 121, since the undisputed evidence established the fact that the plaintiff had actual, open, notorious, hostile, adverse, continuous, visible, exclusive and uninterrupted possession of the property for a period of twelve years before the defendants ever stirred up the fuss, and the fact that they did take it away from her by force in the Spring of 1945 could not possibly give them any right to hold it. Her title had become absolute long before the defendants ever purchased the property next door, and had the survey made.

Please permit appellant to humbly request this Honorable Court to render the judgment that should have been rendered in the Court below, and stop this expensive litigation.

Dated, Fairbanks, Alaska,
June 9, 1948.

Respectfully submitted,
BAILEY E. BELL,
Attorney for Appellant.